

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i> ,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S MOTION FOR A TELEPHONIC STATUS CONFERENCE
TO DISCUSS CONDUCT OF JULY 28-29, 2009 *DAUBERT* HEARING**

Plaintiff, the State of Oklahoma ("the State") respectfully requests a telephonic status conference at the Court's earliest convenience to discuss the conduct of the July 28-29, 2009 *Daubert* hearing. Among the issues the State would like to discuss at the status conference are (1) organizing the various *Daubert* motions filed by the two sides into subject-matter groupings; (2) if the various *Daubert* motions are organized into subject-matter groupings, the order in which those groupings will be heard; and (3) the presentation of live testimony at the *Daubert* hearing. The State has conferred with Defendants, and Defendants have no objection to a status conference (although it is the State's understanding that they do object to certain of the State's proposals as to how the *Daubert* hearing should be conducted).

I. Legal Standard

It is well established that Fed. R. Evid. 702 imposes on a district court a gatekeeper obligation to ensure that expert testimony be not only relevant, but reliable. *See Dodge v. Cotter Corp.*, 328 F.3d 1212, 1221 (10th Cir. 2003). "Though the district court has discretion in how it conducts the gatekeeper function, we have recognized that it has no discretion to avoid

performing the gatekeeper function." *Id.* at 1223 (emphasis in original). The Tenth Circuit has explained:

A natural requirement of the gatekeeper function is the creation of "a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law." *Goebel*, 215 F.3d at 1087; *see also Dodge I*, 203 F.3d at 1200 n.12 (urging the district court on remand to "vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert*" to ensure that each "particular opinion is based on valid reasoning and reliable methodology"). In *Velarde*, we observed that "*Kumho* and *Daubert* make it clear that the [district] court must, on the record, make some kind of reliability determination." 214 F.3d at 1209. Thus, we held in *Goebel* that when faced with a party's objection, a district court "must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." 215 F.3d at 1088 (emphasis added).

Id. (emphasis in original).

The Northern District of Oklahoma has on previous occasions allowed *Daubert* motions to be organized into groupings. *See, e.g., Herd v. Asarco, Inc.*, 2003 U.S. Dist. LEXIS 27380, *18-19 (N.D. Okla. May 28, 2003). Additionally, the Northern District of Oklahoma has on previous occasions allowed the presentation of live testimony at *Daubert* hearings. *See id.* at *19. In fact, in reviewing the adequacy of the procedures used by the trial court in *Dodge*, the Tenth Circuit found cause to comment on the refusal of a trial court to accept live testimony from experts in a *Daubert* hearing:

The important issue here is the aggregate effect of several of the district court's decisions. Initially, the court limited the length of any *Daubert* brief and appendix to 20 pages. Aplt. App. Though the court was put on notice of specific challenges to certain experts' methodology and reasoning, it insisted on the exclusive use of argument and proffers at the *Daubert* hearing instead of meaningful live witness testimony. Although a detailed, in-depth hearing addressing disputed reasoning and methodologies was critical to a proper resolution of the entire case, the *Daubert* hearing lasted just over four hours and allowed for little more than a cursory review of the contested issues. The court itself proved this point by asking questions of counsel that only the expert could realistically answer.

Dodge, 328 F.3d at 1228.

II. The State's Proposal

There are 21 *Daubert* motions before the Court. *See* DKT #2028 (Harwood), #2056 (Engel), #2058 (Churchill), #2059 (Grip), #2060 (McGuire), #2061 (Clay), #2063 (Bierman), #2064 (Davis), #2067 (Teaf), #2068 (King), #2071 (Sullivan), #2072 (Cowan), #2074 (Murphy), #2078 (Taylor), #2082 (Olsen), #2083 (Johnson), #2090 (Bacterial Holding Times and Analysis), #2242 (Evaluation of CV Remediation Strategy), #2263 (Payne), #2270 (Desvousges / Rausser), #2272 (Stratus). A number of these motions share common or related subject matters - *e.g.*, watershed modeling, bacteria / PCR biomarker, PCA, disinfection by-products / water quality / risk assessment, and contingent valuation. As such, the State proposes that the motions be topically grouped and ordered in the following manner:

July 28, 2009

1. Watershed Modeling: DKT #2063 (Bierman) & #2056 (Engel)
2. Bacteria / PCR Biomarker: DKT #2028 (Harwood) & #2090 (Bacterial Holding Times and Analysis)
3. DKT #2059 (Grip)
4. DKT #2064 (Davis)
5. DKT #2061 (Clay)
6. DKT #2058 (Churchill)

July 29, 2009

1. Principle Component Analysis (PCA): #2072 (Cowan), #2074 (Murphy), #2082 (Olsen) & #2083 (Johnson)
2. Disinfection By-Products / Water Quality / Risk Assessment: #2060 (McGuire), #2067 (Teaf) & #2071 (Sullivan)

3. Contingent Valuation Study: #2242 (Evaluation of CV Remediation Strategy),
#2270 (Desvousges / Rausser) & #2272 (Stratus)
4. #2263 (Payne)
5. #2068 (King)

A number of these motions involve complex scientific and technical issues. Clearly, where such complex scientific and technical issues are involved, live testimony from experts can help the court in performing its gatekeeper function. *See Dodge*, 328 F.3d at 1228. Specifically, the State would like to present live testimony by Dr. Engel on watershed modeling issues, Dr. Harwood on PCR biomarker issues and on bacterial holding times and analysis issues, Dr. Sadowksy on PCR biomarker issues, Dr. Olsen on PCA issues, Dr. Loftis on PCA issues, Dr. Teaf on disinfection by-products / water quality / risk assessment issues, and Dr. Hanemann on issues pertaining to the State's contingent valuation study.

The State submits that the preceding grouping and ordering of the *Daubert* motions, together with live testimony by the experts identified above, present an efficient and fair method of addressing these motions.

III. Conclusion

WHEREFORE, in light of the foregoing, the State's motion for a telephonic status conference at the Court's earliest convenience to discuss the conduct of the July 28-29, 2009 *Daubert* hearing should be granted, and the State's proposal for the conduct of the *Daubert* hearing should be adopted.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ David P. Page

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
 (admitted *pro hac vice*)
 Ingrid L. Moll
 (admitted *pro hac vice*)
 MOTLEY RICE, LLC
 20 Church Street, 17th Floor
 Hartford, CT 06103
 (860) 882-1676

Jonathan D. Orent
 (admitted *pro hac vice*)
 Michael G. Rousseau
 (admitted *pro hac vice*)
 Fidelma L. Fitzpatrick
 (admitted *pro hac vice*)
 MOTLEY RICE, LLC
 321 South Main Street
 Providence, RI 02940
 (401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com

Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC	
Counsel for State of Oklahoma	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.	
John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
Colin C. Deihl	cdeihl@faegre.com
Randall E. Kahnke	rkahnke@faegre.com
FAEGRE & BENSON, LLP	
Dara D. Mann	dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP	
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC	

James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick	bchadick@bassettlawfirm.com
Vincent O. Chadick	vchadick@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmmpc.com
Randall E. Rose	rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.	
<u>Counsel for George's Inc. & George's Farms, Inc.</u>	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<u>Counsel for Peterson Farms, Inc.</u>	
John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<u>Counsel for Simmons Foods, Inc.</u>	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com

SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
Timothy T. Jones	tim.jones@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
<u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.</u>	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
<u>Counsel for Willow Brook Foods, Inc.</u>	
Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	
Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<u>Counsel for US Chamber of Commerce and American Tort Reform Association</u>	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u>	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
<u>Counsel for Oklahoma Farm Bureau, Inc.</u>	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov

<u>Counsel for State of Arkansas and Arkansas National Resources Commission</u>	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u>	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
<u>Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation</u>	
John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net
David E. Choate	dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP	
<u>Counsel for Arkansas Farm Bureau Federation</u>	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
<u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u>	
Duane L. Berlin	dberlin@levberlin.com
LEV & BERLIN PC	
<u>Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research</u>	

Also on this 13th day of July, 2009 I mailed a copy of the above and foregoing pleading to:

Thomas C Green -- via email: tcgreen@sidley.com
Sidley, Austin, Brown & Wood LLP

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall, Esq
58185 County Rd 658
Kansas, Ok 74347

Cary Silverman -- via email: csilverman@shb.com
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)

/s/ David P. Page